

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAY L. HOLLOWAY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,636
<b>WICHITA TOOL COMPANY, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>CONTINENTAL WESTERN INSURANCE COMPANY)</b>	)	
Insurance Carrier	)	

**ORDER**

The respondent and its insurance carrier appealed the Award dated September 1, 1999 entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on January 5, 2000.

**APPEARANCES**

Robert R. Lee of Wichita, Kansas, appeared for the claimant. Nate Burghart of Topeka, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

Without first determining that claimant made a good faith effort to find appropriate employment after he recovered from his injuries, the ALJ found claimant had a 100 percent wage loss. When averaged with a 42 percent task loss, and 8 percent was deducted for pre-existing impairment,<sup>1</sup> claimant was awarded a 63 percent permanent partial general disability. The respondent and its insurance carrier appealed that decision and contend that claimant's benefits should be limited to the functional impairment rating, less the 8 percent pre-existing impairment, because he has not made a good faith effort to find

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<sup>1</sup> K.S.A. 44-501(c).

appropriate employment. Respondent argues that claimant retains the ability to earn a wage that would equal 90 percent or more of the average gross weekly wage that claimant was earning at the time of his injury. Conversely, claimant argues the ALJ's award should be modified to award benefits based upon a permanent total disability or, in the alternative, the ALJ's award, including the finding of a 100 percent wage loss, should be affirmed. The only issue before the Appeals Board on this appeal is the nature and extent of claimant's injury and disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After considering the entire record, the Appeals Board finds that the ALJ's Award should be modified to find a 33 percent work disability, but should otherwise be affirmed.

Because his is an "unscheduled" injury, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 1995 Supp. 44-510e:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The above statute, however, must be read in light of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer offered that paid a comparable wage. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

The ALJ did not make any findings concerning claimant's refusal of the respondent's accommodated job offer or whether claimant made a good faith effort to find appropriate employment. After considering the record, the Appeals Board finds claimant was justified in refusing the accommodated job offer made by respondent before claimant had reached

maximum medical improvement because claimant could not physically perform that work. But thereafter claimant did not make a good faith effort to find appropriate work. Therefore, Copeland limits claimant's wage loss to the difference between his pre-injury average weekly wage and his post-injury wage earning ability.

Respondent argues that claimant is capable of earning a comparable wage. But the Appeals Board disagrees. Claimant's condition severely restricts the number of jobs that he can perform. Given claimant's medical restrictions and physical limitations, the Appeals Board finds his wage earning ability is \$5.25 per hour. This was the opinion given by claimant's vocational expert, Jerry Hardin, based upon the restrictions recommended by Dr. Kris Lewonowski. By imputing this wage, the claimant's wage loss is 24 percent.<sup>2</sup>

Averaging the 24 percent wage loss and the 42 percent task loss yields a 33 percent work disability. After deducting the 8 percent functional impairment determined to be pre-existing, the permanent partial general disability award should be for 25 percent.

The Appeals Board adopts the findings and conclusions set forth in the ALJ's Award to the extent they are not inconsistent with the above.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated September 1, 1999, entered by Administrative Law Judge John D. Clark should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Jay L. Holloway, and against the respondent, Wichita Tool Company, Inc., and its insurance carrier, Continental Western Insurance Company, for an accidental injury which occurred August 2, 1995, and based upon an average weekly wage of \$277.33 for 77.07 weeks of temporary total disability compensation at the rate of \$184.90 per week or \$14,250.24, followed by 88.23 weeks of permanent partial disability compensation at the rate of \$184.90 per week or \$16,313.73, for a 25% permanent partial general disability, making a total award of \$30,563.97, which is ordered paid in one lump sum less amounts previously paid.

The Appeals Board adopts all other orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

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<sup>2</sup> \$5.25 per hour times 40 hours equals \$210.00 per week. When this is divided by \$277.33, claimant's average weekly wage at the time of his injury, the resulting wage loss is 24 percent.

Dated this \_\_\_\_ day of January 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Wichita, KS  
Mark A. Buck, Topeka, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director